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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

CARL WILLIAM MONTGOMERY,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether the Petitioner was proved guilty beyond a reasonable doubt?

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND REQUEST FOR SUMMARY REVERSAL

CARL WILLIAM MONTGOMERY, your Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, and the Petitioner further requests Summary Reversal.

QUESTIONS PRESENTED FOR REVIEW

Whether the Petitioner was proved guilty beyond a reasonable doubt?

PARTIES

People of the State of Illinois, by Christopher Freese and Paul Stone, State's Attorneys of Moultrie County; Robert J. Biderman and Perry Lee Miller, State's Attorneys Appellate Service Commission.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported verbatim herein. (App. "A", p. I). The opinion of the State of Illinois Appellate Court, Fourth District, is reported verbatim he[illegible] .. (App. "B", pp. I-VIII).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on the 5th day of February, 1985. (App. "A", p. I) The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C., Section 1257 (3).

The statutory provisions conferring on this Court's jurisdiction to review the judgment in question is, Section 1, Amendment Fourteen, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Defendant, a 42-year old married man with five (5) children, was charged with the September 9, 1983 residential burglary of a rural home, near Atwood, in Moultrie County, Illinois. After a plea of not guilty, Defendant was tried by a jury on February 7, 1984 which found him guilty of the offense of residential burglary. The trial judge sentenced the Defendant to a term of imprisonment of seven (7) years. Subsequently, Defendant filed a timely post-trial motion which was denied. The Defendant then appealed to the Appellate Court, Fourth District, State of Illinois, which Court confirmed the jury's verdict of guilty. Defendant filed a motion for re-hearing which was also denied by the Appellate Court. The Defendant then filed a Petition for Leave to Appeal to the Supreme Court of Illinois which was also denied. The Defendant remains free on bond.

Defendant was also charged with another residential burglary which allegedly occurred also on September 9, 1983 at another rural home near the first burglary scene, but in neighboring Macon County. The Defendant was tried by a jury on April 4, 1984. The prosecution and defense witnesses and evidence were virtually the same as in the Moultrie County trial. The People's primary witness was again the Defendant's half-brother, Wayne Montgomery. The jury of Macon County acquitted the Defendant.

REASONS FOR GRANTING THE WRIT

I. - ARGUMENT

At the jury trial, the prosecutor's chief witness was the half-brother of the Defendant, Wayne Montgomery, who had previously pleaded guilty to three (3) separate burglaries in three (3) separate counties for which he received a six (6) year term of imprisonment to run concurrently. He also had a substantial criminal record. The admitted burglar, Wayne Montgomery, testified that he expected no reward in exchange for his testimony inasmuch as he was already serving concurrent sentences when he was ordered to appear at the Defendant's trial. Wayne Montgomery was the only witness to testify that the Defendant committed or was present at the scene of the crime, a farm house in a rural area, and that the Defendant had been with him on that date from approximately 8:30 or 9:00 A.M. until the early morning hours of the next day. *People vs. Marshall,* 26 Ill. App. 3rd 905.

The only other witnesses of significance presented by the prosecutor were Wayne Montgomery's wife, who admittedly sold stolen property for her husband, and another brother, Dale Montgomery, who was also a half-brother to the Defendant, and a girlfriend of Dale Montgomery, both of whom possessed at one time in their homes a television which was admittedly stolen by Wayne Montgomery as a result of one of the other burglaries for which he pleaded guilty. The prosecutor also introduced physical evidence in the form of a gold watch which had been stolen from the victim, but which was sold later by the alleged accomplice, Wayne Montgomery's wife, and a palm print from the crime scene which was identified as belonging to said Wayne Montgomery. The prosecutor produced no physical evidence which implicated the Defendant.

The Defendant produced twelve (12) witnesses who testified that the Defendant was at or near his home in Springfield, Illinois, a distance of approximately forty (40) miles east of the scene of the crime, on the day of the alleged crime, September 9, 1983. The witnesses included the Defendant's wife and four (4) children who had special reason to remember that day inasmuch as it was the birthday of the Defendant's youngest son, for which there was a celebration in the evening hours and the sharing of a birthday cake by the family. There was no evidence or testimony by the prosecution which would suggest that the Defendant's witnesses testified falsely.

Defendant also produced testimony through his mother, Lucille Lyles, who was familiar and close to Defendant's half-brother, Wayne Montgomery. Mrs. Lyles testified that Wayne Montgomery lived in her house off and on for years and she knew him well. She testified that Wayne was very jealous of the Defendant, especially after the Defendant had overcome his drinking (alcohol) problem.

The prosecution's chief witness, Wayne Montgomery, testified that the Defendant arrived at his father's cabin about five (5) miles south of Beardstown, Illinois, "around 8:30 or 9:00 in the morning". He also testified that he and the Defendant left the location "about 10:00 that morning". Wayne's wife, Mary, testified that she arrived at the same cabin at approximately 9:00 to 11:00 A.M., afterwhich time the Defendant arrived. She further testified that the Defendant and her husband left around 12:30 or 1:00 P.M. the same day. However, objective evidence in the form of the Defendant's record of telephone calls which was introduced into evidence showed that a telephone call was made from the Defendant's house to a friend's house in Literberry, Illinois, which is approximately thirty-five (35) miles west of Springfield, the Defendant's home, at 10:17 A.M. on September 9, 1983.

The evidence and testimony of the prosecution's four (4) primary witnesses showed directly or circumstantially that all had reasons to depart from the truth to protect one another. Besides receiving a very favorable minimum term of imprisonment by the three (3) respective state's attorneys who prosecuted Wayne Montgomery as a result of his plea of guilty to three (3) residential burglaries in three (3) separate counties, said Wayne Montgomery tried to protect his wife, Mary, his full-brother, Dale Montgomery, and Dale's girlfriend, Betty Simonds. Testimony of the witnesses showed that Mary Montgomery knew of the plans by her husband to commit a burglary and later after the burglary, sold a gold watch which was stolen during the burglary. Wayne Montgomery and Mary Montgomery both at least had in their possession a television known to have been stolen from one of the burglaries in Cass County, Illinois. In spite of these admissions by the parties, none were or have been prosecuted for any offense related to their possession of stolen property or any other crime.

The Defendant presented testimony and evidence through twelve (12) associates, friends, or family members who all stated that the Defendant was either at his home or nearby in Springfield, Illinois all day on the day of the burglary. Although their testimony varied in minor details at the trial which was approximately six (6) months after the alleged burglary, they all were sure and convincing that the Defendant was at or near his home on that date. Most of the Defendant's witnesses were able to recall that day due to the Defendant's youngest son having celebrated his birthday on that date.

The prosecutor was not able to show any special bias or departure from the truth by his cross-examination of the Defendant's alibi witnesses, other than normal family or friendship affinities.

Defendant contends that he was not proven guilty beyond a reasonable doubt, and that the post-conviction

motion filed by the Defendant and heard by the trial judge which was denied, was a violation of "due process" under the Fourteenth Amendment. Likewise, the Defendant raised the same issue before the Appellate Court of Illinois, Fourth District, which denied the Defendant relief by affirming his conviction. The Defendant then filed a petition for leave to appeal to the Supreme Court of the State of Illinois based on the same contentions as in the lower courts, and that said Supreme Court denied his petition. *People vs. Wilson,* 66 Ill. 2d 346; *Estelle vs. Williams,* Tex. 1976, 96 S.Ct. 1691; *State vs. Scielzo,* 1983, 460 A. 2d 951, 190 Conn. 191; *Riggs vs. State,* 1976, 367 A. 2d 22, 34 Md.App. 324.

II - ARGUMENT

Although it is technically irrelevant to this petition, the Defendant was tried in the Macon County Circuit Court for the same crime of residential burglary which allegedly occurred within minutes of the one in Moultrie County for which the Defendant was convicted, and the Defendant, Carl William Montgomery, was found not guilty by a jury. The testimony and evidence was virtually identical except the location of the burglary. The inconsistent verdicts showed the fallibility of the jury system. However, it is relevant to this petition in that it demonstrates a great need and reason for the Defendant to have a judgment of the State Court reviewed by this honorable Court. If two juries are able to reach opposite decisions, then there must be some fire in all of the smoke which surrounds this matter. The Defendant was not proved guilty beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari and Request for Summary Reversal should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

PROOF OF SERVICE

TO: Honorable Chris E. Freese/Paul Stone
Moultrie County State's Attorney
Sullivan, Illinois 61951
and
Honorable Robert J. Biderman, Deputy Director
State's Attorneys Appellate Service Commission
151 Bruns Lane, Suite 103
Springfield, Illinois 62702

The undersigned certifies that copies of Petition for Writ of Certiorari to the United States Supreme Court have been served upon the opposing counsel in the above-entitled matter by enclosing same in an envelope addressed as indicated above, with postage fully prepaid, and by depositing said envelope in the U.S. Mail in Jacksonville, Illinois on the 3rd day of April, 1985.

G. RONALD KESINGER, *Counsel for Petitioner*
235 North West Street
Jacksonville, Illinois 62650

SUBSCRIBED and sworn to before me this 3rd day of April, 1985.

NOTARY PUBLIC

APPENDIX

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Order of the Supreme Court of State of Illinois denying Petition for Leave to Appeal, dated February 28, 1985 ..... A-2

Order of the Appellate Court of Illinois, Fourth District, dated September 5, 1984, affirming the Judgment of the Circuit Court of Moultrie County A-3

IN THE SUPREME COURT OF ILLINOIS

February 5, 1985

No. 61028

PEOPLE STATE OF ILLINOIS,
Respondent

v.

CARL WILLIAM MONTGOMERY,
Petitioner

From Appellate Court, Fourth District

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 28th day of February, 1985.

/s/ Juleann Hornyak
Clerk,
Supreme Court of the State of Illinois.

REVERSED AND REMANDED AND OPINION FILED SEPTEMBER 5, 1984

COURT OF APPEALS
Fourth Appellate Court District

OPINION
No. 4-84-0224

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

v.

CARL WILLIAM MONTGOMERY,
Defendant-Appellant

Appeal from the Circuit Court of Moultrie County
Trial Court Case No. 83CR125

JUSTICE WEBBER delivered the order of the court:

Following a jury trial, defendant was convicted of residential burglary in violation of section 19-3 of the Criminal Code of 1961 (Ill. Rev. Stat. 1983, ch. 38, par. 19-3) and sentenced to 7 years' imprisonment. On appeal, defendant claims that he was not proved guilty beyond a reasonable doubt and that evidence of other offenses was improperly admitted at his trial. We affirm.

Defendant was charged with the offense of residential burglary in an information filed on October 18, 1983. A jury trial was held on February 6 and 7, 1984. At the trial Robert Personnett testified that his home, near Atwood in Moultrie County, was broken into on September 9, 1983, between 6:30 and 8:30 p.m. A television, a stereo receiver and speaker, a tape player, and a full set of socket wrenches were taken by the burglars.

Wayne Montgomery, a half-brother of the defendant, testified that the defendant arrived at his home in Beardstown on the morning of September 9, 1983, driving a green Ford LTD. They subsequently discussed the

possible burglary of Wayne's former father-in-law's home in Arcola. Part of this discussion took place in front of Wayne's wife, Mary. Defendant and Wayne Montgomery then drove to Arcola and considered several houses to burglarize, but they left when people were observed in the back yards. They then left Arcola and, on the way back to defendant's home in Springfield, they noticed the Personnett residence near Atwood. Finding the home empty and a key to the back door hanging on a hook on the back gate, they entered the residence and proceeded to take a color television and some stereo equipment. They also entered a garage and took an impact wrench and a set of socket wrenches. They left the home and committed a further residential burglary in Macon County before returning to defendant's home in Springfield.

Wayne Montgomery testified that they arrived at defendant's home between 8:30 and 9:00 p.m. Defendant's wife and children were present as well as defendant's half-brother Dale Montgomery, Dale's girlfriend Betty Simons, and defendant's stepson Jim Withers. Dale Montgomery and Betty Simons left shortly thereafter. At this point the defendant and Wayne discussed plans for disposing of the stolen property. Jim Withers expressed an interest in the stereo. Defendant then made several phone calls, including calls to John Mardis and Orville Bartels. The defendant and Wayne then drove to Bartels' home in Chandlerville, arriving after midnight. Wayne remained in the car while the defendant and Bartels discussed the stolen property. Bartels looked at the stolen tools but did not buy anything.

Wayne stated that his reason for testifying against the defendant was that, in the past, defendant had "shoved a lot of people in front of him to cover up his own burglaries." Wayne testified that he received three concurrent 6-year prison sentences after pleading guilty to the Personnett burglary and two other burglaries. He stated that he did not expect to gain any favorable

treatment because of his testimony in the present case.

On cross-examination Wayne admitted that he had prior convictions for burglary and battery. He also stated that the defendant had visited him while he was in jail and suggested that they have themselves admitted to the McFarland Zone Center for alcohol treatment in an attempt to "throw justice off." Defendant stated that he had used this tactic several times in the past.

Wayne Montgomery's wife, Mary, corroborated his testimony concerning defendant's meeting with him on the morning of September 9, 1983. She overheard their plans to commit a burglary and observed them as they left Beardstown in defendant's green Ford LTD. She also testified that she was later informed by Wayne that they had indeed committed the burglaries and were in the process of splitting up the money from the sale of the stolen items.

Wayne Montgomery's testimony was further corroborated by the testimony of Dale Montgomery and his girlfriend Betty Simons. Both testified that they had been at defendant's residence twice during the evening of September 9, 1983. The defendant was not home when they arrived on either occasion. They testified that they arrived at the defendant's home for the second time at approximately 8:30 p.m. with a birthday card for one of defendant's children. While there they observed the defendant and Wayne Montgomery come in together. Betty Simons saw them arrive in defendant's green LTD. At this time only defendant's wife, children, and stepson (Jim Withers) were present. Dale Montgomery and Betty Simons left shortly before 9 p.m.

Orville Bartels testified that he had received phone calls from the defendant but was unsure of the date. He did recall that defendant and one of his brothers called and later came by his home on the same night. He looked at some tools, specifically socket sets and wrenches, before deciding not to purchase them.

People's exhibit No. 4 was admitted into evidence. It

consisted of defendant's itemized phone bill covering the evening of September 9, 1983. It listed long distance calls to John Mardis at 9:33 and 9:50 p.m. and a phone call to Orville Bartels at 9:43 p.m.

Defendant introduced the testimony of numerous family members and friends who allegedly observed the defendant at his home during the afternoon and evening of September 9, 1983. None of these witnesses observed Wayne Montgomery at defendant's home. Indeed, defendant's wife stated that he never visited their home. Most of the defense witnesses also denied that Betty Simons and Dale Montgomery were at the defendant's home on the evening of September 9, 1983.

The jury found the defendant guilty of residential burglary. After a hearing on March 23, 1984, defendant was sentenced to 7 years' imprisonment. He filed a timely notice of appeal on March 23, 1984, also.

Defendant now contends that the testimony of his alleged accomplice, Wayne Montgomery, was totally uncorroborated. He claims that this testimony was made with the expectation of leniency and that Wayne Montgomery was in fact rewarded for his testimony. He also claims that the State's witnesses were contradicted by 13 defense alibi witnesses. As a result, defendant argues that he was not proved guilty beyond a reasonable doubt.

It is well established in Illinois that the uncorroborated testimony of an accomplice is a sufficient basis upon which the jury may base a conviction. (*People v. Hermens* (1955), 5 Ill. 2d 277, 125 N.E.2d 500; *People v. Wilson* (1977), 66 Ill. 2d 346, 362 N.E.2d 291.) However, such testimony is often fraught with weaknesses such as the promise of leniency or immunity and malice towards the accused, and should be regarded with skepticism. (*Wilson.*) Evidence of direct contradiction or material corroboration from other sources is therefore entitled to great weight. (*People v. Sheridan* (1977), 51 Ill. App. 3d 963, 367 N.E.2d 422, *cert. denied* (1978), 435 U.S. 975, 56 L.

Ed. 2d 68, 98 S. Ct. 1622.) The question of whether accomplice testimony is a sufficient basis for a conviction is ultimately one for the jury, in its fact finding function, to decide. (*Wilson.*) Its verdict will not be disturbed unless it is plainly apparent that proof beyond a reasonable doubt is lacking. *Sheridan.*

Despite defendant's contention to the contrary, it is clear that Wayne Montgomery's testimony was substantially corroborated. It was corroborated by the testimony of his wife, who overhead the discussion of the planned burglaries and saw Wayne and defendant leave together on September 9, 1983. It was further corroborated by the testimony of Betty Simons and Dale Montgomery, who witnessed their return to defendant's home that night. Additionally, Orville Bartels, a friend of the defendant, testified that defendant and another "Montgomery boy" came to his house late at night and offered to sell him a set of socket wrenches. This testimony not only corroborates that of Wayne Montgomery, but also ties defendant to the Personnett burglary. Furthermore, Wayne Montgomery's testimony was corroborated by the records of the phone company. Defendant can offer no explanation as to how Wayne Montgomery would have gained any knowledge of his phone conversations on the evening of September 9, 1983.

Defendant also alleges that Wayne Montgomery was rewarded for his testimony by lenient sentences for his burglary convictions. However, Wayne's testimony was to the contrary. He expected no reward in exchange for his testimony. He was already serving his concurrent sentences when he was ordered to appear at defendant's trial. It is unlikely, therefore, that Wayne's testimony was induced by a promise of leniency.

Finally, although defendant produced a number of alibi witnesses who directly contradicted the accomplice testimony as well as that of the other State witnesses, any question of credibility was for the jury to decide. Defendant's witnesses were impeached, to varying

extents, by inconsistencies and improbabilities as well as by their close relationship with the defendant and his family. We cannot say that the jury erred in choosing to disbelieve their testimony and in determining that defendant was guilty beyond a reasonable doubt.

Defendant also contends that evidence of other crimes was erroneously admitted into evidence. Wayne Montgomery testified that defendant suggested that "he would go over to Jacksonville and sign us into the mental hospital" since he had used this tactic in the past after "being arrested for certain things." Defendant thought that this would allow them to escape prosecution.

Initially, we note that defendant has waived this argument by failing to object to the testimony at trial and by failing to include it in his detailed post-trial motion. *People v. Pickett* (1973), 54 Ill. 2d 280, 296 N.E.2d 856.

In any event, the admission of this testimony was not error. While evidence of other criminal acts of the accused is generally not admissible, such evidence is admissible when it tends to show the accused's knowledge of the crime. (*People v. Romero* (1977), 66 Ill. 2d 325, 362 N.E.2d 288; *People v. Lindgren* (1980), 79 Ill. 2d 129, 402 N.E.2d 238.) Here, defendant allegedly suggested that both he and Wayne Montgomery admit themselves to the McFarland Zone Center to escape prosecution because he had successfully used this tactic in the past. This evidence shows defendant's knowledge of his guilty and is relevant for this purpose. It was not admitted merely to show defendant's propensity to commit crime. *People v. McDonald* (1975), 62 Ill. 2d 448, 343 N.E.2d 489.

For all the foregoing reasons, the judgment of the circuit court of Moultrie County is affirmed.

Affirmed.

TRAPP and GREEN, JJ., concur.